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NO. ____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

STATE OF MARYLAND,

Petitioner

v.

BRUCE LAMONT DENNIS,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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11 pp

QUESTION PRESENTED

DID THE COURT OF APPEALS CORRECTLY HOLD THAT THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTIONS FOR DISORDERLY CONDUCT AND BATTERY?

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Respondent, Bruce Lamont Dennis, by counsel, Stephen E. Harris, Public Defender of Maryland, and George E. Burns, Jr., Assistant Public Defender, Office of the Public Defender, respectfully requests that the Court deny the Petition for Writ of Certiorari filed by the State of Maryland as there has been no showing that the question presented is one that merits consideration by this Court.

STATEMENT OF THE CASE

Respondent was convicted of disorderly conduct and battery. He was

sentenced to two concurrent terms of imprisonment of forty-five days.[1]

Officer Wayne Foskey of the Princess Anne Police Department testified that on November 27, 1993, he was in a patrol car with another officer (Reid) when he saw a vehicle drive through a stop light. Foskey pursued the vehicle, but the driver of the vehicle ignored Foskey's emergency lights and increased his speed. Foskey shined a flashlight into the car and told the driver to pull over. This command was ignored. During the pursuit, another police car, driven by Trooper Bettina Collins joined the pursuit. Eventually, the vehicle was driven into a driveway and stopped.

Respondent was the passenger and opened the passenger's door of the stopped vehicle. Foskey "yelled at him to shut the car door and stay in the vehicle."

> A. He continued to open the door and stepped out of the vehicle. I again hollered for him to get back in the vehicle and shut the door. He totally ignored me. He shut the door of the vehicle and started walking away, at which time I yelled for him to stop. He still totally ignored me, continued moving away, and at this time, I took him to the ground.
>
> Q. And then what happened?
>
> A. At that time, Mr. Dennis struck me in the ribs with his elbow and began fighting and I ended up spraying him with pepper mace. When I got him to the car, I had to spray him with pepper mace again to get him in the car.

According to Trooper Collins.

> Mr. Dennis and the operator of the vehicle ignored our commands at the time. There were several subjects in the yard

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[1]Petitioner conceded in its Reply to Brief in Opposition in connection with the original Petition in this case to this Court that the disorderly conduct conviction raises no federal issue and is therefore not before this Court. *Maryland v. Dennis*, No. 96-112, (Reply to Brief in Opposition at 1).

at the time who were also yelling at us and saying things to Dennis and the other subject.

REASONS FOR DENYING CERTIORARI

In *Terry v. Ohio*, 392 U.S. 1 (1968) this Court said,

> And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. *Id.* at 21.

This Court has never retreated from this requirement. Indeed the *Terry* Court noted that:

> This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence. *Id.* at n. 18.

Nevertheless, as the Court of Appeals recognized, some courts have applied this requirement more loosely than others.

> Other courts have rejected the stated reason for the stop of a suspect and, yet, upheld the stop as objectively reasonable . . .
>
> *In each case, the officers testified to the facts that the court determined to be controlling* and, in each case, those facts related to the subject being stopped. (citations omitted, emphasis added). Petition at 35a-36a.

State v. Mitchell, 906 P.2d 1013 (Wash. App. 1995) is an example of this line of cases. An officer noticed Mitchell on a public street in a residential area at night carrying a semi-automatic handgun which Mitchell tucked into his waistband as the officer passed. The officer stopped Mitchell. Although the officer was unable to identify the provision of the penal code that Mitchell might be violating, the Court

observed that the facts testified to by the officer did give a reasonable basis for a violation of a provision of the penal code. In addition, "Although the officer did not name the particular crime for which he could articulate a reasonable suspicion, his suspicion was based on the very factors which constitute unlawful display of a weapon." *Id.* at 148.

Analogous circumstances were present in *State v. Bolosan*, 890 P.2d 673 (Hawaii 1995).

> "At about 11:20 p.m. that night, Honolulu Police Officer Gerry Asato noticed the car that Bolosan was driving stopped at a red light at an intersection 75 to 100 feet away. He heard the engine revving loudly and saw a plume of heavy exhaust. When the light turned green, Bolosan drove through the intersection toward Officer Asato's position. Bolosan did not screech the tires and did not travel at a high speed. Officer Asato did not notice any other cars near Bolosan's car and, when he testified at the motion to suppress, he could not remember if there had been other people on the street or sidewalk, or in the neighborhood." *Id.* at 674.

The officer thought that this conduct might be a violation of Exhibition of Speed. Although there was not a sufficient factual basis to support that conclusion, the specific facts testified to by the officer gave rise to a reasonable belief that the muffler ordinance was being violated. However, *Bolosan* also highlights one of the problems with such cases. Because the officer had not relied on a belief that the muffler ordinance was being violated, he had not been cross-examined on the issue. Therefore the case was remanded for further proceedings on the issue.

Whatever the merit of cases such as *Mitchell* and *Bolosan*, they are plainly

inapplicable to the facts in the case at bar. Petitioner observes that,

> Noteworthy to the trial court were the facts that the driver of the vehicle had just engaged the police in a high speed chase and that there were individuals in the immediate area who were "yelling and shouting at the officer." Petition at 3-4.

But as the Court of Appeals pointed out,

> Trooper Collins testified that the persons gathered in the yard where the driver's vehicle was stopped were yelling at the police and saying things to the driver and the petitioner. We find it highly significant, however, that the State has proffered no evidence as to the genesis of the yelling, what was being said, even whether the persons were reacting in favor of the petitioner or the police. *Id.* at 26a.

Indeed, as the Court of Appeals also noted,

> In this case, the observations and testimony concerning the events leading up to the stop all focused on the actions of the driver of the automobile; this testimony in no way detailed what the petitioner did to warrant his detention. *Id.* at 36a.

In sum, the police in this case failed to provide a specific objectively reasonable factual basis for the seizing of Respondent.

Petitioner also relies on a series of cases which it characterizes as rejecting as irrelevant the "subjective intention" of the officer. *United States v. Mangum*, 100 F.3d 164 (D.C. Cir. 1996) is representative of these cases. The court noted that "Appellant concedes that the police officers' corroboration of the informant's tip provided reasonable articulable suspicion for an investigative *Terry* stop of the vehicle and pat-down of its occupants." *Id.* at 168. It was in this context that the court said,

> Finally, even if appellant had produced evidence showing that the officers intended to arrest Appellant prior to stopping him an finding the gun, such evidence would be irrelevant. In determining whether a stop or search is reasonable under the Fourth Amendment, courts look to objective evidence, not subjective intentions. *Whren v. United States*, --- U.S. ---, ----, 116 S.Ct. 1769, 1774, 135 L.Ed.2d 89 (1996) (rejecting the proposition that "the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved."); *Terry*, 392 U.S. at 21, 88 S.Ct. at 1879 (adopting objective standard for determining reasonableness of searches or seizures under the Fourth Amendment). (footnote omitted). *Id.* 169.

The *Mangum* line of cases thus stands for the unexceptionable proposition that after a specific reasonable basis for the stop has been demonstrated the fact that the officer had some other motive in mind is irrelevant.

In the case at bar, there was a failure to establish a reasonable basis for the seizing of Respondent. Thus, the *Mangum* issue that a facially proper stop may actually be a pretext has nothing whatsoever to do with this case.

Petitioner also urges this Court to revisit *Maryland v. Wilson*, --- U.S. --- , 117 S.Ct. 882 (1997). The first problem is procedural. Petitioner originally requested that this court grant a petition on the basis of *Whren v. United States*, --- U.S. ---, 116 S.Ct. 1769 (1996) and *Wilson*, *supra*. (pending at the time of the first petition). This Court remanded the case to the Court of Appeals solely for reconsideration on the basis of *Whren*. Unaccountably, Petitioner now contends that Court of Appeals should have reconsidered its decision on the basis of *Wilson*. To borrow from Petitioner, "It goes almost without saying that the Court, in granting a writ of

certiorari [on the basis of *Whren* alone] rejected" Petitioner's claim as to *Wilson*. Petition at 7.

Petitioner's arguments on the facts and the law are no better. Factually, the case does not present the problem of whether Respondent could be ordered to stay in the car without any specific reason.

Foskey testified that only after Respondent exited the vehicle, shut the door, started to walk away, *and* ignored an order to stop, did Foskey assault Respondent. Trooper Collins stated that "both subjects did exit against our commands, so we asked them just to get down." Thus, Foskey acted because Respondent walked away -- whether Respondent was entitled to get out of the car is irrelevant. Indeed, Foskey could not have acted on any other basis. If Respondent had stopped rather than walked away, there would have been no reason for Foskey's attack.

Petitioner claims,

> To apply *Wilson* to this case represents only a slight, but logical, extension of that case, and one that fully accords with *Wilson's* undergirding rationale. Petition at 16.

This claim demonstrates a fundamental misunderstanding of both *Wilson* and logic. *Wilson* extended the rule enunciated in *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), that whenever an automobile is lawfully stopped the driver may be ordered out of the vehicle, to passengers. In *Mimms* it was conceded there was "nothing unusual or suspicious" about Mimms's behavior. *Id.* at 109. The theory was that in every case, without regard to specific facts, the driver could be ordered out of the car

on the basis of officer safety. This *per se* rule precludes having a *per se* rule that drivers and passengers may be ordered to stay in the automobile. Either officer safety mandates a *per se* rule of in or out, it cannot logically mandate both. Thus, *Wilson* is relevant only to the extent that it mandates that police may not order the passenger to remain in the automobile without some articulable reasonable basis.

In sum, Petitioner has failed to articulate any substantial reason for this Court to issue a writ of certiorari.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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